

John A. Vogt (State Bar No. 198677)
JONES DAY
3161 Michelson Drive, Suite 800
Irvine, CA 92612
(T) 949-851-3939
(F) 949-553-7539
javogt@jonesday.com

Attorneys for Defendant
Experian Information Solutions, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ELETTRA MEEKS, JOSEPH DELACRUZ,
STEPHANIE LAGUNA, AMBER
LEONARD, and BECKY WITT, on behalf of
themselves and others similarly situated,

Plaintiffs,

v.

EXPERIAN INFORMATION SOLUTIONS,
INC.; MIDWEST RECOVERY SYSTEMS,
LLC; and CONSUMER ADJUSTMENT
COMPANY, INC.,

Defendants.

Case No. 3:21-cv-03266-VC

Assigned to: Judge Vince Chhabria

**EXPERIAN INFORMATION
SOLUTIONS, INC.'S NOTICE OF
MOTION AND MOTION TO
COMPEL ARBITRATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[SUPPORTING DECLARATION OF DAVID
WILLIAMS AND [PROPOSED] ORDER FILED
UNDER SEPARATE COVER]

Date: July 29, 2021

Time: 10:00 a.m.

Place: Courtroom 4

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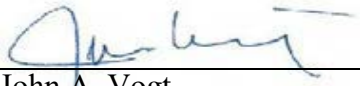
NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE NOTICE THAT, on July 29, 2021, at 10:00 a.m. in Courtroom 4 of the above-referenced Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Honorable Vince Chhabria presiding, defendant Experian Information Solutions, Inc. will, and hereby does, move this Court for an Order, pursuant to section 4 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, compelling all claims against Experian to individual arbitration and staying this action until arbitration has been completed.

The Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the accompanying Declaration of David Williams, all of the papers on file in this action, and upon such other and further evidence or argument that the Court may consider.

Dated: June 25, 2021

JONES DAY

By: 
John A. Vogt

Attorneys for Defendant
Experian Information Solutions, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

In support of its Motion to Compel Arbitration, defendant Experian Information Solutions, Inc. (“EIS”) respectfully submits the following Memorandum of Points and Authorities.

INTRODUCTION

This is a putative class action under the Fair Credit Reporting Act. There are five named plaintiffs: Electra Meeks, Joesph De La Cruz, Stephanie Laguna, Amber Leonard, and Becky Witt. Collectively, they generally allege the following. They each obtained loans from what they contend are “tribal lenders.” They contend that those loans were illegal under state law. They ceased paying on the loans, and the debts became delinquent. The loans, the payment histories, and delinquency information were reported by the lenders to EIS. They maintain that a class action settlement should have put EIS on notice that their loans were illegal, and should have ceased reporting on their credit files (even though EIS was not a party to that case). After Plaintiffs disputed the loans, EIS deleted them from their files. Nonetheless, they contend that the loans were subsequently purchased by third parties—defendants Midwest Recovery Systems, LLC and Consumer Adjustment Company, Inc.—who continued to report the loans to EIS and allegedly altered the “date of first delinquency.” That adjustment, Plaintiffs say, made the delinquency of their loans appear to be more recent than they actually were, and prevented the debt from aging off their files in a timely manner. Plaintiffs contend that EIS’s actions constituted a willful violation of the FCRA. EIS now moves to compel Plaintiffs’ claims to arbitration.

Each Plaintiff is a member of CreditWorksSM—a free online credit monitoring product that is provided by EIS’s affiliate, ConsumerInfo.com, Inc. (which does business as Experian Consumer Services (“ECS”)). Each of Plaintiffs’ CreditWorksSM membership predates the filing of this lawsuit. Plaintiffs’ CreditWorksSM memberships afforded them access to how credit information appeared in their EIS credit files. Each Plaintiff used their CreditWorksSM membership, logging on to the service and accessing the information in their file at EIS before and after this lawsuit was filed. Through the use of their memberships, Plaintiffs learned the facts giving rise to their claims in this case, including how the loans at issue were being reported and the alleged changes to the “date of first delinquency.”

When Plaintiffs enrolled in CreditWorksSM, they agreed to the Terms of Use governing that service. The Terms of Use has an arbitration clause, which provides that Plaintiffs and ECS—as well as ECS’s affiliate, defendant EIS—agree to arbitrate “all disputes and claims between us” that “aris[e] out of or relat[e] to” Plaintiffs’ use of their CreditWorksSM subscription. Even though the Terms of Use delegate all questions of arbitrability to an arbitrator, Plaintiffs’ claims fall within the scope of the arbitration clause, as they “aris[e] out of or relat[e] to” their use of CreditWorksSM. In the recent *Coulter v. Experian* decision, the Honorable Nitza I. Quiñones Alejandro granted EIS’s motion to compel arbitration, upholding the validity and enforceability of the arbitration clause in the *same* Terms of Use at issue here. *See Coulter v Experian Information Solutions, Inc.*, 2021 WL 735726 (E.D. Pa. Feb. 25, 2021). This Court should now do the same.

Thus, under the Federal Arbitration Act, 9 U.S.C. § 1, et seq., EIS respectfully moves for an order compelling this matter to arbitration, as required under Plaintiffs’ written agreement, and staying this action until arbitration has been completed.

STATEMENT OF FACTS

I. SUMMARY OF THE FACTS

Over various points in time, each of the Plaintiffs enrolled in CreditWorksSM. (*See* Declaration of David Williams (Williams Decl.), ¶¶ 3, 9, 14, 19, and 25.) At the time of enrollment, each Plaintiff agreed to bound by the Terms of Use governing their subscription. (*Id.*, ¶¶ 3-4, 9-10, 14-15, 19-20, and 25.) Every version of the Terms of Use that was in effect when each Plaintiff enrolled had an arbitration clause, which required Plaintiffs to litigate, among other things, all claims against EIS that “relate to” or “arise out of” their membership in non-class arbitration. (*Id.*, Exs. 3, 5, 6, 9, 12, 13 and 15.) Furthermore, every version of the Terms of Use that was in effect when each Plaintiff enrolled had an amendment clause, which provides that the Plaintiffs agreed to be bound by the then-current version of the Terms of Use every time they used their membership. (*Id.*) After enrolling, every Plaintiff continuously has used their membership, including after the current version of the Terms of Use came into effect, thereby binding them to that agreement. (*Id.*, ¶¶ 6, 11, 16, 22 and 26.) The current version of the Terms of Use, like all of the versions before it, has an arbitration clause, which requires Plaintiffs to litigate all of the claims they plead in this case

in non-class arbitration. (*Id.*, Ex. 6.) Like all prior versions of the Terms of Use, the current version expressly allows EIS to invoke and enforce the arbitration clause. (*Id.*) And, like all prior versions of the Terms of Use, the current version broadly delegates all questions regarding arbitrability to an arbitrator to decide. (*Id.*)

II. PLAINTIFFS AGREED TO THE TERMS OF USE

A. Plaintiff Electtra Meeks

On November 2, 2018, Ms. Meeks enrolled in CreditWorksSM. (*Id.*, ¶ 3.) In order to do so, Ms. Meeks had to complete two webforms. (*Id.*) The first form required Ms. Meeks to enter her personal information—*i.e.*, her name, address, phone number, and e-mail address. (*Id.*, ¶ 3 and Ex. 1.) After she did so, Ms. Meeks had to click the “Submit and Continue” button on the form to continue with the enrollment process. (*Id.*) Ms. Meeks clicked the “Submit and Continue” button, and was presented with a second form to complete. (*Id.*) That form required Ms. Meeks to enter her social security number, date of birth, and a username and password. (*Id.*, ¶ 4.) Immediately below the boxes to enter and confirm her password, was the following disclosure: “By clicking “Submit Secure Order”: I accept and agree to your [Terms of Use Agreement](#), as well as acknowledge receipt of your [Privacy Policy](#) and [Ad Targeting Policy](#).” (*Id.*, ¶ 4 and Ex. 2.) Immediately below the disclosure was a large purple button that reads: “Submit Secure Order.”

The screenshot shows a webform with two input fields for "Password" and "Confirm Password". Below these fields is a disclosure text: "By clicking 'Submit Secure Order': I accept and agree to your [Terms of Use Agreement](#), as well as acknowledge receipt of your [Privacy Policy](#) and [Ad Targeting Policy](#)." This is followed by a statement: "I authorize ConsumerInfo.com, Inc., also referred to as Experian Consumer Services ("ECS"), to obtain my credit report and/or credit score(s), on a recurring basis to:" and a bulleted list of three items: "Provide my credit report (and/or credit score) to me for review while I have an account with ECS.", "Notify me of other products and services that may be available to me through ECS or through unaffiliated third parties.", and "Notify me of credit opportunities and advertised credit offers." Below the list is another line of text: "I understand that I may withdraw this authorization at any time by [contacting ECS](#)." At the bottom of the form is a large purple button with the text "Submit Secure Order".

(*Id.*) The webform, the disclosure, and the “Submit Secure Order” button appeared on a single webpage. (*Id.*) After entering her information, Ms. Meeks clicked the “Submit Secure Order” order button, thereby accepting and agreeing to the Terms of Use. (*Id.*) A true and correct copy of

the Terms of Use that was in effect when Ms. Meeks enrolled is attached as Exhibit 3 to the Williams Declaration. After enrolling, Ms. Meeks continuously used her service, including after the current version of the Terms of Use came into effect. (*Id.*, ¶ 6.)¹

B. Plaintiff Amber Leonard

On June 1, 2019, Ms. Leonard enrolled in CreditWorksSM. (*Id.*, ¶ 9.) In order to do so, Ms. Leonard had to complete the same two webforms that Ms. Meeks completed. (*Id.* and Exs. 7 and 8.) Like Ms. Meeks, Ms. Leonard entered her personal information, and clicked the “Submit and Continue” button on the first form to continue with the enrollment process. (*Id.*, ¶ 9) After she clicked the “Submit and Continue” button, she was presented with, and completed, the second form. (*Id.*, ¶ 10 and Ex. 8.) After entering her information, Ms. Leonard clicked the “Submit Secure Order” order button, thereby accepting and agreeing to the Terms of Use Agreement. (*Id.*) A true and correct copy of the Terms of Use that was in effect when Ms. Leonard enrolled is attached as Exhibit 9 to the Williams Declaration. After enrolling, Ms. Leonard continuously used her service, including after the current version of the Terms of Use came into effect. (*Id.*, ¶ 11.)

C. Plaintiff Stephanie Laguna

On May 2, 2019, Ms. Laguna enrolled in CreditWorksSM. (*Id.*, ¶ 14.) In order to do so, Ms. Laguna had to complete the same two webforms that Ms. Meeks and Ms. Leonard completed. (*Id.* and Exs. 7 and 8.) Like her co-plaintiffs, Ms. Laguna entered her personal information, and clicked the “Submit and Continue” button on the first form to continue with the enrollment process. (*Id.*) After she clicked the “Submit and Continue” button, she was presented with, and completed, the second form. (*Id.*, ¶ 15 and Ex. 8.) After entering her information, Ms. Laguna clicked the “Submit Secure Order” order button, thereby accepting and agreeing to the Terms of Use Agreement. (*Id.*) A true and correct copy of the Terms of Use that was in effect when Ms. Laguna enrolled is attached as Exhibit 9 to the Williams Declaration. After enrolling, Ms. Laguna

¹ On July 11, 2020, Ms. Meeks activated the “Boost” feature on her account. (*Id.*, ¶ 5.) In order to do so, Ms. Meeks was required re-affirm her consent to the Terms of Use. (*Id.*, and Ex. 4) The Terms of Use that she re-affirmed are those that are attached as Exhibit 5 to the Williams Declaration.

continuously used her service, including after the current version of the Terms of Use came into effect. (*Id.*, ¶ 16.)

D. Plaintiff Becky Witt

On October 23, 2016, Ms. Witt enrolled in CreditWorksSM. (*Id.*, ¶ 19.) In order to do so, Ms. Witt had to complete two webforms. (*Id.* and Exs. 10 and 11.) Like her co-plaintiffs, Ms. Witt entered her personal information, and clicked the “Submit and Continue” button on the first form to continue with the enrollment process. (*Id.*) After she clicked the “Submit and Continue” button, she was presented with, and completed, the second form. (*Id.*, ¶ 20 and Ex. 11.) After entering her information, Ms. Witt clicked the “Submit Secure Order” order button, thereby accepting and agreeing to the Terms of Use Agreement. (*Id.*) A true and correct copy of the Terms of Use that was in effect when Ms. Witt enrolled is attached as Exhibit 12 to the Williams Declaration. After enrolling, Ms. Witt continuously used her service, including after the current version of the Terms of Use came into effect. (*Id.*, ¶ 22.)²

E. Plaintiff Joseph De La Cruz

On August 28, 2020, Mr. De La Cruz enrolled in CreditWorksSM. (*Id.*, ¶ 25.) In order to successfully enroll, Mr. De La Cruz had to complete a single webform. (*Id.*) The form required Mr. De La Cruz to enter his personal information—*i.e.*, his name, address, phone number, and e-mail address. (*Id.* and Ex. 14.) After he entered his personal information, Mr. De La Cruz had to click the “Create Your Account” button on the webform in order to enroll. (*Id.*) Immediately below the boxes to enter his e-mail address and password, was the following disclosure: “By clicking “Create Your Account”: I accept and agree to your [Terms of Use Agreement](#), as well as acknowledge receipt of your [Privacy Policy](#) and [Ad Targeting Policy](#).” (*Id.*) Immediately below the disclosure was a large purple button that reads: “Create Your Account.” The webform, the disclosure, and the “Create Your Account” button appeared on a single webpage. (*Id.*) After

² On March 3, 2019, Ms. Witt activated the “Boost” feature on her account. (*Id.*, ¶ 21.) In order to do so, Ms. Witt was required re-affirm her consent to the Terms of Use. (*Id.* and Ex. 4.) The Terms of Use that she re-affirmed are those that are attached as Exhibit 13 to the Williams Declaration.

entering his information, Mr. De La Cruz clicked the “Create Your Account” button, thereby accepting and agreeing to the Terms of Use Agreement. (*Id.*) A true and correct copy of the Terms of Use that was in effect when Mr. De La Cruz enrolled is attached as Exhibit 15 to the Williams Declaration. After enrolling, Mr. De La Cruz continuously used his service, including after the current version of the Terms of Use came into effect. (*Id.*, ¶ 26.)

III. PLAINTIFFS AGREED TO ARBITRATE THEIR CLAIMS

The Terms of Use in effect when each Plaintiff enrolled had a section entitled, “Amendments,” which advised them that they would be bound by the then-current Terms of Use each time they “order[ed], access[ed], or use[d]” any of the Services or Websites described in the agreement. (*Id.*, Exs. 3, 5, 6, 9, 12, 13 and 15.) Every subsequent version of the Terms of Use has the identical section on Amendments, including the current version. (*Id.*, Ex. 6.) While all versions of the Terms of Use allowed Plaintiffs to opt-out of amendments to the arbitration clause, *see id.*, Exs. 3, 5, 6, 9, 12, 13 and 15, at no time did any of the Plaintiffs ever reject any changes that were made. (*Id.*, ¶¶ 7, 12, 17, 23 and 27.) After they enrolled in CreditWorks, each of the Plaintiffs continuously used their Service and the Websites—including throughout 2021—which binds them to the current version of the Terms of Use Agreement. (*Id.*, ¶ 6, 11, 16, 22 and 26.)

The current (operative) version of the Terms of Use Agreement begins with the section, “Overview and Acceptance of Terms,” which reads, in pertinent part:

OVERVIEW AND ACCEPTANCE OF TERMS

You agree that by creating an account with ECS (as defined below), or accessing or using our Services (as defined below), website(s) (such as this website, <https://usa.experian.com>, or any affiliated website (including, but not limited to, **Experian.com**, **FreeCreditReport.com**, **FreeCreditScore.com**, **CreditReport.com**, **Creditchecktotal.com**, **CreditScore.com**, **usa.experian.com**, and **experian.experiandirect.com**)), or mobile applications (such as the Experian app), as well as any content provided or accessible in connection with the website(s) or mobile application(s), including information, user interfaces, source code, reports, images, products, services, and data (each website and mobile application referred to herein as a “Website,” and collectively, as “Websites”), you represent to ECS that you have read, understood, and expressly consent and agree to be bound by this Terms of Use Agreement, and the terms, conditions, and notices contained or

referenced herein (“Agreement”) whether you are a “Visitor” (which means that you simply browse or access a Website), or a “Customer” (which means that you have created an account with ECS, or enrolled or registered with a Website, or are accessing or using a Service).

* * *

For the avoidance of doubt, this Agreement expressly applies to: (a) your access to and use of the Websites; (b) any and all transactions between you and ECS through the Websites, including for the provision of any Services or of any credit, personal, financial or other information delivered as part of or in conjunction with free Services or paid Services, including any such information that may be archived to the extent made available on the Websites, such as (i) for your purchase of non-membership based Services such as the 3 Bureau Credit Report and FICO® Scores, the FICO Industry or other Base FICO Scores and/or an Experian Credit Report and FICO Score, (ii) enrollment and use of free Services (such as EXPERIAN CREDITWORKSSM Basic), and/or enrollment, purchase and use of membership based Services (such as EXPERIAN CREDITWORKSSM Premium, Experian IdentityWorksSM, or Experian Credit TrackerSM); and (iii) your access to and use of calculators, credit resources, text, pictures, graphics, logos, button items, icons, images, works of authorship and other information and all revisions, modifications, and enhancements thereto contained in the Websites.

You may not browse the Websites, or create an account or register with ECS, or use or enroll in any Services, and you may not accept this Agreement, if you are not of a legal age to form a binding contract with ECS. If you accept this Agreement, you represent that you have the capacity to be bound by it. Before you continue, you should print or save a local copy of this Agreement for your records.

THE SERVICES AND WEBSITES ARE SUBJECT TO ALL TERMS AND CONDITIONS CONTAINED HEREIN AND ALL APPLICABLE LAWS AND REGULATIONS. PLEASE READ THIS AGREEMENT CAREFULLY. YOUR ACCEPTANCE OF, ORDER OF, USE OF, AND/OR ACCESS TO, THE SERVICES AND WEBSITES CONSTITUTES YOUR AGREEMENT TO ABIDE BY EACH OF THE TERMS AND CONDITIONS SET FORTH HEREIN. IF YOU DO NOT AGREE WITH ANY OF THESE TERMS OR CONDITIONS, DO NOT USE, ACCESS OR ORDER ANY SERVICE OR ACCESS OR USE THE WEBSITES. IF YOU HAVE ALREADY BEGUN ACCESSING OR USING THE SERVICES AND/OR WEBSITES AND DO NOT AGREE TO BE BOUND BY THIS AGREEMENT, IMMEDIATELY CEASE USING THE SERVICE OR WEBSITE AND/OR DISCARD ANY INFORMATION OR PRODUCTS YOU RECEIVED VIA ANY SERVICE OR WEBSITE (TO THE EXTENT APPLICABLE), AND CALL CUSTOMER CARE

1 **AT 1-855-962-6943 TO CANCEL YOUR ACCOUNT WITH ECS.**
 2 **NOTE, YOU MAY ALSO BE ABLE TO DEACTIVATE YOUR PAID**
 3 **SERVICE AND RETAIN YOUR ACCOUNT WITH ECS ONLINE, AS**
 4 **AND TO THE EXTENT EXPLAINED IN FURTHER DETAIL**
 BELOW.

5 *(Id., Ex. 6 (emphasis in original).)*

6 The Terms of Use also has a section entitled “Dispute Resolution By Binding Arbitration”
 7 which reads, in pertinent part:

8 **DISPUTE RESOLUTION BY BINDING ARBITRATION**

9 PLEASE READ THIS CAREFULLY. IT AFFECTS YOUR RIGHTS.

10 SUMMARY:

11 MOST CUSTOMER CONCERNS CAN BE RESOLVED QUICKLY AND
 12 TO THE CUSTOMER'S SATISFACTION BY CALLING ECS'S
 13 CUSTOMER CARE DEPARTMENT AT 1-855-962-6943. IN THE
 14 UNLIKELY EVENT THAT ECS'S CUSTOMER CARE DEPARTMENT
 15 IS UNABLE TO RESOLVE A COMPLAINT YOU MAY HAVE
 16 REGARDING A SERVICE OR WEBSITE TO YOUR SATISFACTION
 17 (OR IF ECS HAS NOT BEEN ABLE TO RESOLVE A DISPUTE IT HAS
 18 WITH YOU AFTER ATTEMPTING TO DO SO INFORMALLY), WE
 19 EACH AGREE TO RESOLVE THOSE DISPUTES THROUGH BINDING
 20 ARBITRATION OR SMALL CLAIMS COURT INSTEAD OF IN
 21 COURTS OF GENERAL JURISDICTION TO THE FULLEST EXTENT
 22 PERMITTED BY LAW. ARBITRATION IS MORE INFORMAL THAN
 23 A LAWSUIT IN COURT. ARBITRATION USES A NEUTRAL
 24 ARBITRATOR INSTEAD OF A JUDGE OR JURY, ALLOWS FOR
 25 MORE LIMITED DISCOVERY THAN IN COURT, AND IS SUBJECT
 26 TO VERY LIMITED REVIEW BY COURTS. ARBITRATORS CAN
 27 AWARD THE SAME DAMAGES AND RELIEF THAT A COURT CAN
 28 AWARD. ANY ARBITRATION UNDER THIS AGREEMENT WILL
 TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS
 AND CLASS ACTIONS ARE NOT PERMITTED. ECS WILL PAY ALL
 COSTS OF ARBITRATION, NO MATTER WHO WINS, SO LONG AS
 YOUR CLAIM IS NOT FRIVOLOUS. HOWEVER, IN ARBITRATION,
 BOTH YOU AND ECS WILL BE ENTITLED TO RECOVER
 ATTORNEYS' FEES FROM THE OTHER PARTY TO THE SAME
 EXTENT AS YOU WOULD BE IN COURT.

 Arbitration Agreement:

 (a) ECS and you agree to arbitrate all disputes and claims between us arising
 out of this Agreement directly related to the Services or Websites to the

1 maximum extent permitted by law, except any disputes or claims which
 2 under governing law are not subject to arbitration. This agreement to
 3 arbitrate is intended to be broadly interpreted and to make all disputes and
 4 claims between us directly relating to the provision of any Service and/or
 your use of any Website subject to arbitration to the fullest extent permitted
 by law. The agreement to arbitrate includes, but is not limited to:

5 claims arising out of or relating to any aspect of the relationship between us
 6 arising out of any Service or Website, whether based in contract, tort, statute
 7 (including, without limitation, the Credit Repair Organizations Act) fraud,
 misrepresentation or any other legal theory; claims that arose before this or
 8 any prior Agreement (including, but not limited to, claims relating to
 advertising); claims that are currently the subject of purported class action
 9 litigation in which you are not a member of a certified class; and claims that
 may arise after the termination of this Agreement.

10 For purposes of this arbitration provision, references to "ECS," "you," and
 11 "us" shall include our respective parent entities, subsidiaries, affiliates
 (including, without limitation, our service provider, CSID), agents,
 12 employees, predecessors in interest, successors and assigns, websites of the
 13 foregoing, as well as all authorized or unauthorized users or beneficiaries of
 Services and/or Websites or information under this or prior Agreements
 14 between us relating to Services and/or Websites. Notwithstanding the
 foregoing, either party may bring an individual action in small claims court.
 15 You agree that, by entering into this Agreement, you and ECS are each
 waiving the right to a trial by jury or to participate in a class action to the
 16 maximum extent permitted by law. This Agreement evidences a transaction
 in interstate commerce, and thus the Federal Arbitration Act governs the
 17 interpretation and enforcement of this arbitration provision. This arbitration
 18 provision shall survive termination of this Agreement.

19 * * *

20 (c) . . . The arbitration will be governed by the Commercial Dispute
 21 Resolution Procedures and the Supplementary Procedures for Consumer
 22 Related Disputes (collectively, "AAA Rules") of the American Arbitration
 Association ("AAA"), as modified by this Agreement, and will be
 23 administered by the AAA. If the AAA is unavailable or refuses to arbitrate
 the parties' dispute for any reason, the arbitration shall be administered and
 24 conducted by a widely-recognized arbitration organization that is mutually
 agreeable to the parties, but neither party shall unreasonably withhold their
 25 consent. If the parties cannot agree to a mutually agreeable arbitration
 organization, one shall be appointed pursuant to Section 5 of the Federal
 26 Arbitration Act. In all events, the AAA Rules shall govern the parties'
 dispute. The AAA Rules are available online at www.adr.org, by calling the
 27 AAA at 1-800-778-7879, or by writing to the Notice Address. The AAA
 28 Rules may change from time to time, and you should review them
 periodically.

1 All issues are for the arbitrator to decide, including the scope and
 2 enforceability of this arbitration provision as well as the Agreement's other
 3 terms and conditions, and the arbitrator shall have exclusive authority to
 4 resolve any such dispute relating to the scope and enforceability of this
 5 arbitration provision or any other term of this Agreement including, but not
 6 limited to any claim that all or any part of this arbitration provision or
 7 Agreement is void or voidable. However if putative class or representative
 8 claims are initially brought by either party in a court of law, and a motion to
 9 compel arbitration is brought by any party, then the court shall have the
 10 power to decide whether this agreement permits class or representative
 11 proceedings. The arbitrator shall be bound by the terms of this Agreement
 12 and shall follow the applicable law. In this regard, the arbitrator shall not
 13 have the power to commit errors of law or legal reasoning, and any award
 14 rendered by the arbitrator that employs an error of law or legal reasoning
 15 may be vacated or corrected by a court of competent jurisdiction for any such
 16 error. Unless ECS and you agree otherwise, any arbitration hearings will take
 17 place in the county (or parish) of your billing address. If your claim is for
 18 \$10,000 or less, we agree that you may choose whether the final arbitration
 19 hearing will be conducted solely on the basis of documents submitted to the
 20 arbitrator, through a telephonic hearing, or by an in-person hearing as
 21 established by the AAA Rules. If your claim exceeds \$10,000, the right to a
 22 hearing will be determined by the AAA Rules. Except as otherwise provided
 23 for herein, ECS will pay all AAA filing, administration and arbitrator fees
 24 for any arbitration initiated in accordance with the notice requirements
 25 above. If, however, the arbitrator finds that either the substance of your claim
 26 or the relief sought in the Demand is frivolous or brought for an improper
 27 purpose (as measured by the standards set forth in Federal Rule of Civil
 28 Procedure 11(b)), then the payment of all such fees will be governed by the
 AAA Rules. In such case, you agree to reimburse ECS for all monies
 previously disbursed by it that are otherwise your obligation to pay under
 the AAA Rules.

* * *

(f) YOU AND ECS AGREE THAT EACH MAY BRING CLAIMS
 AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL
 CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN
 ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.
 Further, unless both you and ECS agree otherwise, the arbitrator may not
 consolidate more than one person's claims, and may not otherwise preside
 over any form of a representative or class proceeding. The arbitrator may
 award injunctive relief only in favor of the individual party seeking relief
 and only to the extent necessary to provide relief warranted by that party's
 individual claim. If this specific subparagraph (f) is found to be
 unenforceable in its entirety, then the entirety of this arbitration provision
 shall be null and void. However, if only a portion of this subparagraph (f) is
 found to be unenforceable, then the unenforceable portion of the provision
 shall be stricken, and the remainder of subparagraph (f) enforced. Any

claims not subject to individual arbitration under applicable law shall be stayed in a court of competent jurisdiction pending completion of the individual arbitration.

(*Id.*, Ex. 6 (emphasis in original).)

IV. PLAINTIFFS' CLAIMS ARE SUBJECT TO ARBITRATION

Plaintiffs allege that each obtained loans from what they contend are “tribal lenders.” (ECF No. 1 at ¶ 1.) They allege that those loans were illegal under state law. (*Id.*) They ceased paying on the loans, and the debts became delinquent. (*Id.*, ¶¶ 62-63, 65-66, 69-70, 77-78 and 85-86.) The loans, the payment histories, and delinquency information were reported by the lenders to EIS. (*Id.*) They maintain that a class action settlement should have put EIS on notice that their loans were illegal, and should have ceased reporting on their credit files—even though EIS was not a party to the case and the settlement imposed no reporting obligation on the part of the settling defendants to EIS. (*Id.*, ¶ 7.) After Plaintiffs disputed the loans, EIS deleted them from their files. (*Id.*, ¶ 62, 73 and 81.) Nonetheless, they contend that the loans were subsequently purchased by third parties, who not only continued to report the loans to EIS but allegedly altered the “date of first delinquency.” (*Id.*, ¶ 6, 51.) That adjustment, Plaintiffs say, made the delinquency of their loans appear to be more recent than they actually were, and prevented the debt from aging off their files in a timely manner. (*Id.*) Through their CreditWorks subscription, Plaintiffs learned how EIS was reporting the loans and “date of first delinquency” that is the subject of this lawsuit. (Williams Decl., ¶¶ 8, 13, 18, 24 and 28.)

LEGAL ARGUMENT

I. THE COURT SHOULD COMPEL THIS MATTER TO ARBITRATION

The FAA provides that “[a] party aggrieved by the alleged failure ... of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

This Court should issue an order compelling this matter to arbitration because the Terms of Use Agreement is an enforceable contract that broadly encompasses “all disputes and claims between [Plaintiffs and Experian] arising out of this Agreement directly related to the Services or Websites to the maximum extent permitted by law, except any disputes or claims which under governing law are not subject to arbitration.” (Williams Decl., Exs. 3, 5, 6, 9, 12, 13 and 15.) It further provides that “[t]his agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims between us directly relating to the provision of any Service and/or your use of any Website subject to arbitration to the fullest extent permitted by law.” (*Id.*) It also provides that “[t]he agreement to arbitrate includes, but is not limited to: claims arising out of or relating to any aspect of the relationship between us arising out of any Service or Website, whether based in contract, tort, statute (including, without limitation, the Credit Repair Organizations Act) fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising); claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and claims that may arise after the termination of this Agreement.” (*Id.*)

A. Plaintiffs’ Claims Are Subject To Binding Arbitration

Section 2 of the FAA mandates that binding arbitration agreements in contracts “evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. This provision “reflect[s] both a ‘liberal federal policy favoring arbitration’ and the ‘fundamental principle that arbitration is a matter of contract,’” such that “courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.”).

1 The FAA promotes a “liberal federal policy favoring arbitration agreements,” and
 2 “questions of arbitrability must be addressed with a healthy regard for the federal policy
 3 favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24
 4 (1983); *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (stating that arbitration agreements falling
 5 within the scope of the FAA “must be ‘rigorously enforce[d]’” (citations omitted)). The FAA
 6 “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in
 7 accordance with their terms.” *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior*
 8 *Univ.*, 489 U.S. 468, 478 (1989). The court “must resolve ‘any doubts concerning the scope
 9 of arbitrable issues ... in favor of arbitration.’” *Moses H. Cone*, 460 U.S. at 24-25.

10 Pursuant to the FAA, arbitration must be compelled where, as here: (1) a valid
 11 agreement to arbitrate exists; and (2) the arbitration agreement encompasses the claims at
 12 issue. *See Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1130 (9th Cir.
 13 2000). An arbitration agreement governed by the FAA, like the arbitration agreement here, is
 14 presumed to be valid and enforceable. *See Shearson/Am. Express v. McMahon*, 482 U.S. 220,
 15 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27
 16 (1985). Indeed, there is a presumption in favor of arbitrability. *AT&T Tech., Inc. v.*
 17 *Communications Workers of America*, 475 U.S. 643, 650 (1986). The party seeking to evade
 18 arbitration bears the burden of showing that the arbitration provision is invalid or does
 19 not encompass the claims at issue. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79,
 20 92 (2000). As demonstrated below, the arbitration clause in the Terms of Use Agreement is
 21 valid and, although the question of the arbitrability of Plaintiffs’ claims ultimately is for an
 22 arbitrator to decide, the controversy between Plaintiffs and Experian clearly falls within the
 23 arbitration clause’s broadly-worded scope.

24 **B. A Valid Agreement to Arbitrate Exists**

25 “While new commerce on the Internet has exposed courts to many new situations, it
 26 has not fundamentally changed the principles of contract.” *Nguyen v. Barnes & Noble, Inc.*,
 27 763 F.3d 1171, 1175 (9th Cir. 2014) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393,
 28

403 (2d Cir. 2004). Courts within this Circuit routinely enforce internet agreements where, as here, the user is required to affirmatively acknowledge the agreement before proceeding with use of the website. *See, e.g., Lee v. Ticketmaster, LLC*, 2019 WL 9096442, at *1 (N.D. Cal. April 1, 2019) (Chhabria, J.), *aff'd* 817 Fed. Appx. 393 (9th Cir. 2020) (“Ticketmaster provided notice of the terms of use adjacent to the ‘Place Order’ button, included a hyperlink to the terms in a contrasting color, and informed the user that “continuing past this page” (*i.e.*, placing an order) would indicate assent to the terms.”).

As a matter of law, Plaintiffs agreed to the Terms of Use Agreement because: (1) they had clear notice of the Terms of Use, (2) they were admonished immediately above the “Submit Secure Order” button that, “By clicking “Submit Secure Order”: I accept and agree to your [Terms of Use Agreement](#), as well as acknowledge receipt of your [Privacy Policy](#) and [Ad Targeting Policy](#),” and (3) they clicked the “Submit Secure Order” button, thereby manifesting their assent to the Terms of Use.³ Numerous courts, under indistinguishable facts, have found that website users were bound by the Terms of Use.

Indeed, in the recent *Coulter v. Experian* matter, Judge Alejandro granted Experian’s motion to compel arbitration, upholding the validity and enforceability of the arbitration clause in the *same* Terms of Use Agreement at issue here. *See Coulter*, 2021 WL 735726. The court ruled that “reasonable notice was provided when Defendant’s website advised Plaintiff that “[b]y clicking ‘Submit Secure Order’: [He] accept[s] and agree[s] to [their] Terms of Use Agreement . . .” *Id.* at *5 (emphasis in original). The court further found that “[t]he full Terms of Use Agreement, readily available to Plaintiff by clicking on the highlighted link, contained the Arbitration Provision entitled ‘DISPUTE RESOLUTION BY BINDING ARBITRATION.’” *Id.* The court also explained that, “[b]y clicking the ‘Submit Secure Order’ button, Plaintiff manifested his assent to the Terms of Use Agreement.” *Id.* In short,

³ With regard to Mr. De La Cruz, the website similarly admonished him: “By clicking “Create Your Account”: I accept and agree to your Terms of Use Agreement, as well as acknowledge receipt of your Privacy Policy and Ad Targeting Policy.” (Williams Decl., ¶ 25 and Ex. 14.)

1 “[b]ecause Plaintiff had reasonable notice and manifested his assent, . . . the Terms of Use
2 Agreement and the Arbitration Provision therein constitute a valid agreement to arbitrate.” *Id.*
3 This Court should rule in the same manner.

4 Similarly, in *Graf v. Match.com, LLC*, No. CV 15-3911 PA (MRWx), 2015 WL
5 4263957 (C.D. Cal. July 10, 2015), the district court ruled that users of Match.com’s website
6 agreed to an arbitration provision in the Terms of Use “when they clicked on a ‘Continue’ or
7 other similar button on the registration page where it was explained that by clicking on that
8 button, the user was affirming that they would be bound by the Terms of Use, which were
9 always hyperlinked and available for review.” *Id.* at *4. Just as in *Graf*, the Terms of Use at
10 issue here were expressly referenced and hyperlinked in the disclosure located immediately
11 above the “Submit Secure Order” button; and the disclosure stated that by clicking the “Submit
12 Secure Order” button, the online user was accepting the Terms of Use.

13 *Crawford v. Beachbody, LLC*, No. 14cv1583-GPC(KSC), 2014 WL 6606563 (S.D. Cal.
14 Nov. 5, 2014), also is indistinguishable from the facts at hand. There, the district court found
15 that the plaintiff had agreed to a forum selection clause found in a website’s Terms and
16 Conditions. Just like here, the plaintiff in *Crawford* “had to click an orange button that read
17 ‘PLACE ORDER.’” *Id.* at *3. Above the button the following text was presented to the
18 plaintiff: “By clicking Place Order below, you are agreeing that you have read and understand
19 the Beachbody Purchase Terms and Conditions, and Team Beachbody Terms and Conditions.”
20 *Id.* Just like here, “[t]he terms ‘Terms [of] [Use]’ were in blue font while the rest of the
21 language in the sentence was in [black] font, which was hyperlinked to the full text of the
22 Terms and Conditions.” *Id.*

23 *Fteja v. Facebook* also is indistinguishable from the facts at hand. There,
24 Facebook.com had disclosed: “By clicking Sign Up, you are indicating that you have read and
25 agree to the Terms of Service.” 841 F. Supp. 2d at 835. Plaintiffs likewise were warned:
26 “By clicking “Submit Secure Order”: I accept and agree to your **Terms of Use Agreement**, as
27 well as acknowledge receipt of your **Privacy Policy** and **Ad Targeting Policy**.” *See also Swift v.*
28

Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011) (enforcing Terms of Use because the plaintiff “was required to and did click on an ‘Accept’ button directly above a statement that clicking on the button served as assent to the [website’s] terms of service along with a blue hyperlink directly to the terms of service”).

The Terms of Use Agreement expressly allows affiliates of Experian Consumer Service to invoke the agreement’s arbitration clause:

For purposes of this arbitration provision, references to “ECS,” “you,” and “us” shall include our respective parent entities, subsidiaries, affiliates (including, without limitation, our service provider, CSID), agents, employees, predecessors in interest, successors and assigns, websites of the foregoing, as well as all authorized or unauthorized users or beneficiaries of Services and/or Websites or information under this or prior Agreements between us relating to Services and/or Websites.

(Williams Decl., Exs. 3, 5, 6, 9, 12, 13 and 15.) Defendant Experian Information Solutions, Inc. is an affiliate of ECS. (*Id.*, ¶ 2.)

In sum, by disclosing to users they are agreeing to the Terms of Use, and requiring affirmative action by the user to assent to those terms, Plaintiffs are bound by the Terms of Use. Hence, by clicking the “Submit Secure Order” button—or, in the case of Mr. De La Cruz, the “Create Your Account” button—Plaintiffs agreed to be bound by the then-current version of the Terms of Use Agreement, including its arbitration clause. Thus, a valid agreement to arbitrate exists between Plaintiffs and Experian. *See Coulter*, 2021 WL 735726 at *5.

C. Plaintiffs’ Claims Fall Within The Broadly-Worded Scope Of The Arbitration Clause

If there is any question as to whether Plaintiffs’ claims fall within the scope of the arbitration clause contained in the Terms of Use Agreement, that issue is to be decided by an arbitrator:

All issues are for the arbitrator to decide, including the scope and enforceability of this arbitration provision as well as the Agreement’s other terms and conditions, and the arbitrator shall have exclusive authority to resolve any such dispute relating to the scope and enforceability of this arbitration provision or any other term of this Agreement[.]

(Williams Decl., Exs. 3, 5, 6, 9, 12, 13 and 15 (emphasis added).) Where, as here, the parties have

clearly and unmistakably agreed that the arbitrator should decide the validity and applicability of an arbitration provision, the FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Chiron*, 207 F.3d at 1130 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)); *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010) (same); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, ---U.S.---, 139 S.Ct. 524, 527-530 (2019) (“When the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.”).

Indeed, in *Coulter*, Judge Alejandro explained that “the Arbitration Provision’s Delegation Clause provides that ‘[a]ll issues are for the arbitrator to decide, including the scope and enforceability of this arbitration provision’ and grants the arbitrator ‘exclusive authority to resolve any such dispute relating to the scope and enforceability of this arbitration provision or any other term of this Agreement including, but not limited to any claim that all or any part of this arbitration provision or Agreement is void or voidable.’” 2021 WL 735726 at *4. The court found that “[t]his provision constitutes a ‘clear and unmistakable’ delegation clause under *Henry Shein* and delegates the exclusive authority to resolve ‘all issues’ to the arbitrator, including the ‘scope and enforceability’ of the Arbitration Provision.” *Id.* In short, because the Terms of Use Agreement makes an unambiguous expression of intent to arbitrate arbitrability, any question over whether Plaintiffs’ claims fall within the arbitration clause are for an arbitrator to decide. *Id.*; *Gillette v. First Premier Bank*, No. 3:13-CV-432-LAB-RBB, 2013 WL 3205827 at *2 (S.D. Cal. June 24, 2013) (“Given the parties’ agreement to arbitrate gateway issues of arbitrability, there is actually very little here for the Court to decide. There’s simply no disputing that the credit card application Gillette filled out, as well as the subsequent credit card contract, contain an agreement to arbitrate. This being the case, the Court’s work is more or less done.”).

1 But even if there had not been such delegation, where, as here, the parties have entered
 2 into a valid arbitration agreement, an “order to arbitrate the particular grievance should not be
 3 denied unless it may be said with positive assurance that the arbitration clause is not susceptible
 4 of an interpretation that covers the asserted dispute.” *AT&T Tech.*, 475 U.S. at 650. That is,
 5 “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of
 6 arbitration.” *Mitsubishi Motors*, 473 U.S. at 626. Where an arbitration clause is broadly
 7 worded, there is a heightened presumption of arbitrability, such that “[in] the absence of any
 8 express provision excluding a particular grievance from arbitration, ... only the most forceful
 9 evidence of a purpose to exclude the claim from arbitration can prevail.” *AT&T Tech.*, 475
 10 U.S. at 650 (quoting *United Steelworkers*, 363 U.S. at 582-83).

11 Here, at the outset, the Terms of Use Agreement admonishes: “For the avoidance of
 12 doubt, this Agreement expressly applies to . . . any and all transactions between you and ECS
 13 through the Websites, including for the provision of any Services or of any credit, personal,
 14 financial or other information delivered as part of or in conjunction with free Services or paid
 15 Services” (Williams Decl., Ex. 6.) The arbitration clause provides that “all disputes and
 16 claims between us arising out of this Agreement directly related to the Services or Websites to the
 17 maximum extent permitted by law” are “subject to arbitration.” (*Id.*) It further provides that “[t]his
 18 agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims
 19 between us directly relating to the provision of any Service and/or your use of any Website subject
 20 to arbitration to the fullest extent permitted by law.” (*Id.*) It then provides that “[t]he agreement to
 21 arbitrate includes, but is not limited to: claims arising out of or relating to any aspect of the
 22 relationship between us arising out of any Service or Website, whether based in contract, tort,
 23 statute[.]” (*Id.*)

24 Like all other jurisdictions, the Ninth Circuit treats the phrase “arising out of” and “relating
 25 to” in an arbitration clause as “broad and far reaching.” *Chiron*, 207 F.3d at 1131; *see also In re*
 26 *Remicade (Direct Purchaser) Antitrust Litigation*, 938 F.3d 515, 525 (3rd Cir. 2019) (“Courts have
 27 generally read the terms ‘arising out of’ or ‘relating to’ [in] a contract as indicative of an ‘extremely
 28

1 broad' agreement to arbitrate any dispute relating in any way to the contract. [Citation] Such broad
 2 clauses have been construed to require arbitration of any dispute between the contracting parties
 3 that is connected in any way with their contract." [Citation]); *see also Collins & Aikman Products*
 4 *Co. v. Building Systems, Inc.*, 58 F.3d 16, 20 (2nd Cir. 1995) ("Any claim or controversy arising
 5 out of or relating to th[e] agreement' is the paradigm of a broad clause." (citing *David L. Threlkeld*
 6 *& Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 251 (2d Cir. 1991).) That being the case, if "the
 7 allegations underlying the claims 'touch matters' covered by the parties' ... agreement[], then those
 8 claims must be arbitrated[.]" *Id.* (citations omitted).

9 Here, Plaintiffs' claims against Experian plainly "touch matters" covered by the arbitration
 10 clause. Indeed, by virtue of their CreditWorks subscriptions, Plaintiffs saw how the loans at issue
 11 in this case were reporting on their Experian credit files. Furthermore, claims under the FCRA are
 12 governed by a two-year statute of limitations, which is triggered on the date of discovery of an
 13 alleged violation. *See* 15 U.S.C. § 1681p; *Willey v. J.P. Morgan Chase, N.A.*, No. 09 Civ.
 14 1397(CM), 2009 WL 1938987, at *4 5 (S.D.N.Y. July 7, 2009). The information Plaintiffs obtained
 15 through the their use of their CreditWorks service would place them on notice. For all of these
 16 reasons, Plaintiffs' claims are subject to arbitration.

17 **II. THE ACTION MUST BE STAYED PENDING ARBITRATION**

18 Section 3 of the FAA expressly provides that where, as here, a valid arbitration
 19 agreement requires a dispute to be submitted to binding arbitration, the district court
 20 "shall . . . stay the trial of the action until such arbitration has been had in accordance with the
 21 terms of the agreement." 9 U.S.C. § 3. Because Plaintiffs must be compelled to arbitrate their
 22 claims, the action should be stayed pending completion of arbitration.

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CONCLUSION

For the foregoing reasons, Experian respectfully requests that the Court grant this Motion, enter an order directing Plaintiffs to arbitrate their claims against EIS, and stay this action pending the completion of arbitration.

Dated: June 25, 2020

JONES DAY

By: 

John A. Vogt

Attorneys for Defendant
Experian Information Solutions, Inc.